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No. 80-1990

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR WEINBERGER, ET AL., PETITIONERS

v.

CARLOS ROMERO-BARCELO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents mischaracterize the issue presented in our petition. The question presented is not whether the provisions of the Clean Water Act "temper" the normal equitable discretion of the federal courts, but whether the Act prohibits the courts from taking equitable factors into account at all in formulating a remedy.[1] As stated in our petition (Pet. 10-11), equitable relief is presumptively appropriate to remedy violations of the Clean Water Act

[1]Indeed, in the case respondents cite to support their "tempering" claim (Br. in Opp. 13-14), the district court did not order immediate cessation of activity upon finding a violation. Instead, the court ordered the parties to negotiate a remedial order. *United States* v. *City of Painesville*, 431 F. Supp. 496, 501 (N.D. Ohio 1977). Only after a year of futile negotiations did the district court order cessation of the violating activity, and, even then, it granted a stay pending appeal as a substitute for a grace period. See *United States* v. *City of Painesville*, 644 F. 2d 1186 (6th Cir. 1981), petition for cert. pending, No. 81-164 (filed July 27, 1981).

and we agree that such relief will frequently include enjoining the violation. Our claim is simply that in designing the appropriate relief, the court must carefully consider the particular circumstances to determine the relief most likely to bring the violator into compliance with the Act as soon as practicable. If this consideration shows that an injunction is not appropriate, nothing in the Act or this Court's decisions requires that it be entered.

2. Respondents suggest that the issue presented in our petition will shortly become moot because the EPA has announced a tentative decision to issue an NPDES permit. They claim "administrative processing of the Navy's application for an NPDES permit in all likelihood would be completed before the Court could reach a decision on the merits" (Br. in Opp. 7). As noted in the petition (Pet. 13), Section 401(a) of the Clean Water Act, 33 U.S.C. (Supp. III) 1341(a), requires a certification of compliance with state water quality standards before the EPA may issue an NPDES permit. In the present case, the Governor of Puerto Rico, respondent herein, has requested and received an extension of time to and including December 20, 1981, in which to determine whether a state certification will be issued. Moreover, on June 25, 1981, the Puerto Rico Environmental Quality Board (EQB), also a respondent herein, issued a notice of "Intention to Deny Water Quality Certificate" (App., *infra*).[2]

Should the state water quality certificate ultimately be denied on or before December 20, 1981, further legal or administrative proceedings will have to be taken, either to modify the proposed permit to meet EQB objections to it, or to set aside the EQB's denial of certification. Resolution

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[2]This notice was issued despite the rulings of both the district court and the court of appeals that the Navy had complied with Puerto Rican water quality standards (Pet. App. 18a-22a, 81a-86a).

of these matters may take years. Thus, respondents' suggestion that the issue presented in our petition is likely to become moot before this Court can decide it is simply incorrect.[3]

For the foregoing reasons and the additional reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1981

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[3]Respondents also claim (Br. in Opp. 5) that the petitioners received notice that the incidental release of ordnance into coastal waters might be subject to Section 301 of the Clean Water Act, 33 U.S.C. (& Supp. III) 1311, because a similar claim was raised in *Aluli* v. *Brown*, 437 F. Supp. 602 (D. Hawaii 1977), rev'd in part, 602 F. 2d 876 (9th Cir. 1979). While the Clean Water Act claim may have been included in the complaint, it was never litigated by the parties. *Aluli* was settled in December 1980, through a consent order that did not provide for application for, or receipt of, an NPDES permit.

APPENDIX

JUN 25 1981

ENVIRONMENTAL QUALITY BOARD

PUBLIC NOTICE

INTENTION TO DENY WATER QUALITY CERTIFICATE
NPDES PR 0023949

The Environmental Quality Board (EQB) has received and evaluated an application for a Water Quality Certificate from the U.S. Naval Station Roosevelt Roads, Atlantic Fleet Weapons Training Facility, Vieques, Puerto Rico for military activities on the eastern part of Vieques on lands owned by the United States Navy.

The petitioner proposes shelling from air and sea, to land, and to conduct artillery practices for the purpose of training military personnel.

After evaluating the application for federal discharge permit, the draft federal discharge permit developed by the Environmental Protection Agency, and other available documents, the EQB has the intention of DENYING the requested Water Quality Certificate because there is no reasonable assurance that the U.S. Naval Station Roosevelt Roads will comply with the applicable regulations of the Water Quality Standards and other EQB requirements.

Copy of the discharge permit application filed by the applicant before the Environmental Protection Agency, the Intent to Deny the Water Quality Certificate, and pertinent documents, are available to the public for examination in the Application Office of the EQB, located at Floor M of the Empire Bldg., 204 del Parque Street, Corner of Pumarada Street, Santurce, P.R. Copies of such documents can be obtained ($.20 per page) at the aforementioned address between 8:00 A.M. and 4:30 P.M., from Monday thru

Friday (except holidays) or by writing to the following address: Environmental Quality Board, Box 11488, Santurce, PR 00910.

Concerned or affected parties can submit their written comments to the President of the EQB not later than 30 days after the publication of this notice. The deadline for submitting comments can be extended if it is necessary or appropriate in the public interest.

All affected or concerned parties can request a public hearing. The request should be submitted in writing to the President of the EQB not later than 30 days after the publication of this notice stating the reasons which in the opinion of the applicant merit celebration of the public hearing.

All concerned or affected parties will have a reasonable opportunity to present evidence or testimony during a public hearing on whether or not the Water Quality Certificate should be issued or rejected, if the President of the EQB determines that such hearing is necessary or appropriate.